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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MOUNTAINEERS FOUNDATION,

10 Plaintiff,

11 v.

12 THE MOUNTAINEERS,

13 Defendant.
14

Case No. C19-1819-RSL-TLF

ORDER ADOPTING IN
PART REPORT AND
RECOMMENDATION

15 The Court, having reviewed the Report and Recommendation of the Honorable Theresa
16 L. Fricke, United States Magistrate Judge (Dkt. # 129), plaintiff's objections to the Report and
17 Recommendation (Dkt. # 130), defendant's objections to the Report and Recommendation (Dkt.
18 # 131), the parties' responses to the objections (Dkts. # 132 & 133), and all other relevant
19 documents adopts the Report and Recommendation in part.

20 A district court has jurisdiction to review a Magistrate Judge's report and
21 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "A judge of the court may accept,
22 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate
23 judge." 28 U.S.C. § 636(b)(1). The court reviews de novo those portions of the report and
24 recommendation to which a party makes a specific written objection. United States v. Reyna-
25 Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). "The statute makes it clear that the district
26 judge must review the magistrate judge's findings and recommendations de novo if objection is
27 made, but not otherwise." Id.

28 **I. Plaintiff's Objections**

ORDER ADOPTING IN PART
REPORT AND RECOMMENDATION - 1

1 The Court first addresses objections made by plaintiff, the Mountaineers Foundation.

2 **A. Plaintiff Objects to the R&R's Conclusion That an Easement Exists**

3 Plaintiff argues that the Report “erroneously concludes the Mountaineers have an
4 enforceable easement to continued use of the Preserve for historic and present uses.” Dkt. # 130
5 at 3. Specifically, plaintiff believes this conclusion is erroneous because in Washington, any
6 interest in real property, including easements, must be conveyed by a deed complying with the
7 statute of frauds, not, as is the case here, by mere contract. Id. at 3-6. The Court agrees.

8 Under Washington law, the conveyance of real property rights, including easements,
9 must be accomplished by deed, in writing, signed by the bound parties, and acknowledged by a
10 person authorized to take acknowledgments of deeds. Bale v. Allison, 173 Wn. App. 435, 445
11 (2013) (citing RCW 64.04. 010, .020). Here, the only instrument satisfying these requirements is
12 the warranty deed transferring ownership of the preserve from The Mountaineers to the
13 Foundation. Dkt. # 129 at 41. The parties agree that the warranty deed does not reserve an
14 easement (nor other ownership rights) for The Mountaineers. See Dkt. 89-1, Correction Deed
15 (08/4/1987), at 10.

16 The Washington Supreme Court has stated that “[t]he intent of the original parties to an
17 easement is determined from the deed as a whole. If the plain language is unambiguous,
18 extrinsic evidence will not be considered.” Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn. 2d
19 873, 880 (Wash. 2003). For example, in Newport Yacht Basin Association, the court of appeals
20 held that the trial court had erred in considering extrinsic evidence when determining whether a
21 quitclaim deed was actually intended to convey an easement. Newport Yacht Basin Assn. of
22 Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 56, 71-72 (Wash. Ct. App. 2012). The trial
23 court had considered (1) a real estate tax affidavit filed with the quitclaim deed, describing the
24 deed as a “document in correction of easements” and (2) comments made at contemporaneous
25 board meetings regarding the acquirement of “easements” through quitclaim deeds. Id.
26 However, the court of appeals held that because the language of the quitclaim deed was
27 unambiguous, such extrinsic evidence should not be considered and no easement was created.
28 Id. Here, the language of the warranty deed is similarly unambiguous. Accordingly, the Court

declines to adopt the Report and Recommendation's discussion of the easement issue. Because the determination of whether an easement exists is critical to the analysis of whether the Foundation validly terminated The Mountaineer's access rights to the Preserve, the Court also declines to adopt the Report and Recommendation's discussion of the easement termination issue.

Defendant notes that the "statute of frauds does not apply where the easement is in writing, the easement was intended by the parties, and where there has been at least part performance by the parties." Dkt. # 132 at 3 (citing Kirk v. Tomulty, 66 Wn. App. 231, 237 (1992)). However, the issue of whether the alleged easement may be taken outside the statute of frauds by the doctrine of part performance was first raised in defendant's reply to plaintiff's opposition to defendant's motion for summary judgement (Dkt. # 116) and thus has not been adequately briefed for the Court's consideration. Accordingly, the Court requests additional briefing from the parties addressing how the doctrine of part performance applies to the property rights at issue here. The Court asks defendant to provide supplemental briefing on this issue by March 1, 2023. Plaintiff will have until March 15, 2023 to provide a response. Defendant will have until March 24, 2023 to file an optional reply. Both parties' submissions shall comport with the word count limitations set forth in Local Rule 7(e)(4).

B. Plaintiff Objects to Report's Conclusion That Defendant Has a Protectible Interest in Its MOUNTAINEERS Marks

Plaintiff also objects to the Report's conclusion that defendant has a protectible interest in its MOUNTAINEERS marks. Specifically, plaintiff argues (1) there are disputed questions of material fact regarding third parties' use of similar marks; (2) there are disputed questions of material fact regarding the genericism of defendant's marks. Dkt. # 130 at 8-12.

As to plaintiff's first objection, the evidence it claims was overlooked by the Report is hearsay. See Ponds v. Veterans Med. Rsch. Found., No. C12-1745-BEN-BGS, 2013 WL 607847, at *3 n.1 (S.D. Cal. Feb. 15, 2013) ("Screen shots of internet web pages are not usually admissible to prove the truth of statements contained therein."); see also Bauman v. DaimlerChrysler AG, No. C04-00194-RMW, 2005 WL 3157472, at *10 n.5 (N.D. Cal. Nov. 22,

2005) (noting that web pages provided only unauthenticated hearsay). Even assuming that plaintiff could submit the underlying facts in admissible form at trial, *see* Fed. R. Civ. P. 56(c)(4); JL Beverage Co., LLC v. Jim Beam Brands Co., 828 F.3d 1098, 1110 (9th Cir. 2016) (noting that “at summary judgment a district court may consider hearsay evidence submitted in an inadmissible form, so long as the underlying evidence could be provided in an admissible form at trial”), the proffered web pages still do not compel reconsideration of the Report’s conclusion or analysis.

As to plaintiff’s second objection regarding the Report’s recommendation that the Court find defendant’s marks are not generic, the objections simply restate the arguments from plaintiff’s original briefing. These arguments were addressed by Magistrate Judge Fricke’s Report and Recommendation. Moreover, the Court has thoroughly examined the record before it and finds Magistrate Judge Fricke’s reasoning persuasive in light of that record.

Therefore, the Court ADOPTS the Report and Recommendation’s reasoning as to the defendant’s trademark interest in its MOUNTAINEERS marks.

C. Plaintiff Objects to Report’s Conclusion That the Declaration of Norman Winn Should Not Be Considered

Finally, plaintiff objects to the Report’s conclusion that this Court should decline to consider the Declaration of Norman Winn. Plaintiff’s objection essentially restates the arguments it presented in its initial briefing. The Court has examined the record before it and finds Magistrate Judge Fricke’s reasoning persuasive in light of that record.¹

Accordingly, the Court ADOPTS the Report and Recommendation’s reasoning and conclusion with regard to the declaration of Norman Winn.

II. Defendant’s Objections

The Court next addresses objections made by defendant The Mountaineers.

¹ Plaintiff’s argument that the declaration could be admitted to evidence under the residual hearsay exception of Federal Rule of Evidence 807 does not change the conclusion here.

**A. Defendant Objects to Report's Conclusion That Existence of a License
Cannot Be Established on Summary Judgment**

Defendant objects to the Report's conclusion that there are disputed factual questions precluding summary judgment regarding the existence of a license for the MOUNTAINEERS mark. Dkt. # 131 at 5. Specifically, defendant argues that the only evidence of a factual dispute comes from the declaration of Paul Robisch. Id. at 5-6. However, the Report also states:

Although the record indicates that The Mountaineers and the Foundation operated cooperatively for many years, the record contains conflicting testimony regarding the existence of a licensing agreement, any alleged essential terms, and the effect of any such licensing agreement. See, Dkt. 92, Deposition of Joan Hansen, at 5-27; Dkt. 92, Deposition of the Foundation, at 29-70; Dkt. 92, Deposition of Paul Robisch, at 93-102.

Dkt. # 129 at 11. Thus, the declaration of Paul Robisch was not the only evidence considered by Magistrate Judge Fricke in recommending that the Court decline to grant summary judgment on the issue of licensing. Moreover, the Court has examined the record before it and finds Magistrate Judge Fricke's reasoning persuasive in light of that record. The Court ADOPTS the report's conclusion that there are disputed factual questions regarding the existence of a license and DENIES defendant's motion for summary judgment on this issue.

**B. Defendant Objects to Report's Conclusion That Likelihood of Confusion
Cannot Be Established on Summary Judgment**

Defendant also objects to the Report's conclusion that there are disputed factual questions precluding summary judgment regarding likelihood of confusion.

First, defendant argues that the Report "ignores" the fact that plaintiff's complaint alleges a likelihood of confusion, and that such allegations are binding judicial admissions. Dkt. # 131 at 8-9. "Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988) (internal quotations and citations omitted); see also Ishow.com,

1 Inc. v. Lennar Corp., No. C15-1550-RSL, 2017 WL 3020927, at *3 (W.D. Wash. July 14, 2017)
 2 (finding that defendants had “admitted that there was a likelihood of consumer confusion once
 3 both parties entered the residential homebuilding market” and that this pleading could be “used
 4 as an admission that likelihood of confusion is established for infringement purposes”). The
 5 doctrine of judicial admission does not extend to an alleged admission made in a separate case
 6 from the present action. See Casa del Caffè Vergnano S.P.A. v. ItalFlavors, LLC, 816 F.3d
 7 1208, 1213 (9th Cir. 2016).

8 While plaintiff undoubtedly used broad language in its complaint that supports
 9 defendant’s argument that it admitted a likelihood of confusion between the two marks, see Dkt.
 10 # 1 at 14-16, ¶¶ 66, 70, 71, 73, the Court declines to find plaintiff has made a binding admission
 11 with regard to likelihood of confusion. First, when read in the context of the full complaint, it is
 12 apparent that plaintiff’s allegations of likelihood of confusion are closely tied to its allegations
 13 that defendant made “misleading statements” when using plaintiff’s mark and requested “that
 14 any donations to the Mountaineers Foundation be sent to defendant.” Dkt. # 133 at 7. This is
 15 distinct from an allegation that mere coexistence of the two entities using the disputed
 16 intellectual property is likely to cause confusion. Second, plaintiff’s complaint clearly states that
 17 it does not believe its own use of the relevant mark causes or will cause confusion. Dkt. # 1 at
 18 18, ¶ 89. While these stances may seem inconsistent, inconsistent pleading is permitted under
 19 the Rules. See Fed. R. Civ. P. 8(d)(3).

20 Second, defendant argues that likelihood of confusion is conclusively established by the
 21 continued unauthorized use of a licensor’s trademark by a licensee. Dkt. # 131 at 9. Because the
 22 Court adopts the Report’s conclusion that the existence of a license cannot be determined at the
 23 summary judgment stage, this objection has no bearing on the Court’s analysis.

24 Third, defendant argues that the Report erred in “evaluating the evidence” with regard to
 25 the Sleekcraft factors. Dkt. # 131 at 9. Primarily, defendant argues that because plaintiff either
 26 did not put forward evidence on certain Sleekcraft factors or put forward evidence defendant
 27 considers insufficient to create a factual dispute, summary judgment should be granted in its
 28 favor. Id. at 9-12. Defendant takes issue with the Report for “opin[ing] . . . that there is other

1 evidence it would like to consider that no party offered” stating that “that is not the standard on
2 summary judgment; the standard is whether there are undisputed facts in the record.” Id. at 11.

3 However, as an initial matter, “[w]hen the party moving for summary judgment would
4 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
5 directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has
6 the initial burden of establishing the absence of a genuine issue of fact on each issue material to
7 its case.” C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir.
8 2000). Furthermore, as the Report notes, “[d]ue to the fact-intensive inquiry necessary to
9 evaluate each of these factors, summary judgment on likelihood of confusion grounds is
10 generally disfavored.” Dkt. # 129 (citing JL Bev. Co. LLC v. Jim Beam Brands, Co., 828 F.3d
11 1098, 1105 (9th Cir. 2016)). Here, the Report found that defendant had not met its burden of
12 coming forward with evidence “which would entitle it to a directed verdict.” The Court
13 ADOPTS the report and recommendation on this issue and DENIES defendant’s motion for
14 summary judgment on the issue of likelihood of confusion.

15 For all the foregoing reasons, it is HEREBY ORDERED:

- 16 1. The Court ADOPTS the reasoning and conclusions of the Report and
17 Recommendation with the exception of the Report’s discussion of the easement issue.
18 The Court requests additional briefing from the parties addressing how the doctrine of
19 part performance applies to the property rights at issue here. The Court asks defendant
20 to provide supplemental briefing on this issue by March 1, 2023. Plaintiff will have
21 until March 15, 2023 to provide a response. Defendant will have until March 24, 2023
22 to file an optional reply. Both parties’ submissions shall comport with the word count
23 limitations set forth in Local Rule 7(e)(4).
- 24 2. The Court DENIES the Foundation’s motion for partial summary judgment (Dkt.
25 # 87).
- 26 3. The Court GRANTS IN PART and DENIES IN PART The Mountaineers’ cross-
27 motion for summary judgement (Dkt. # 91). Specifically, the Court finds:
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- a. The Mountaineers own a protectable trademark interest in the 305 Mark (THE MOUNTAINEERS word mark), the 307 Mark (THE MOUNTAINEERS design mark), and the 968 Mark (MOUNTAINEERS BOOKS word mark) for charitable fundraising services for the environment, conservation, outdoor recreation, outdoor education, and natural history, and books in the field of environmental conservation, outdoor recreation, and natural history.
 - b. The Mountaineer marks are not generic for charitable fundraising services for the environment, conservation, outdoor recreation, outdoor education, and natural history, and books in the field of environmental conservation, outdoor recreation, and natural history.
 - c. The Mountaineers has not abandoned their trademark rights for charitable fundraising services.
4. The Court strikes the Foundation's Fifth Affirmative Defense and the Foundation's Sixth Affirmative Defenses as to charitable fund-raising services.
 5. All remaining claims in this action should proceed.
 6. The Clerk is directed to send a copy of this Order to Judge Fricke and the parties in this action.

DATED this 8th day of February, 2023.



Robert S. Lasnik
United States District Judge